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No. 459

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IN THE
Supreme Court of the United States

OCTOBER TERM—1945

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ETHEL KRESBERG,

Petitioner,

—against—

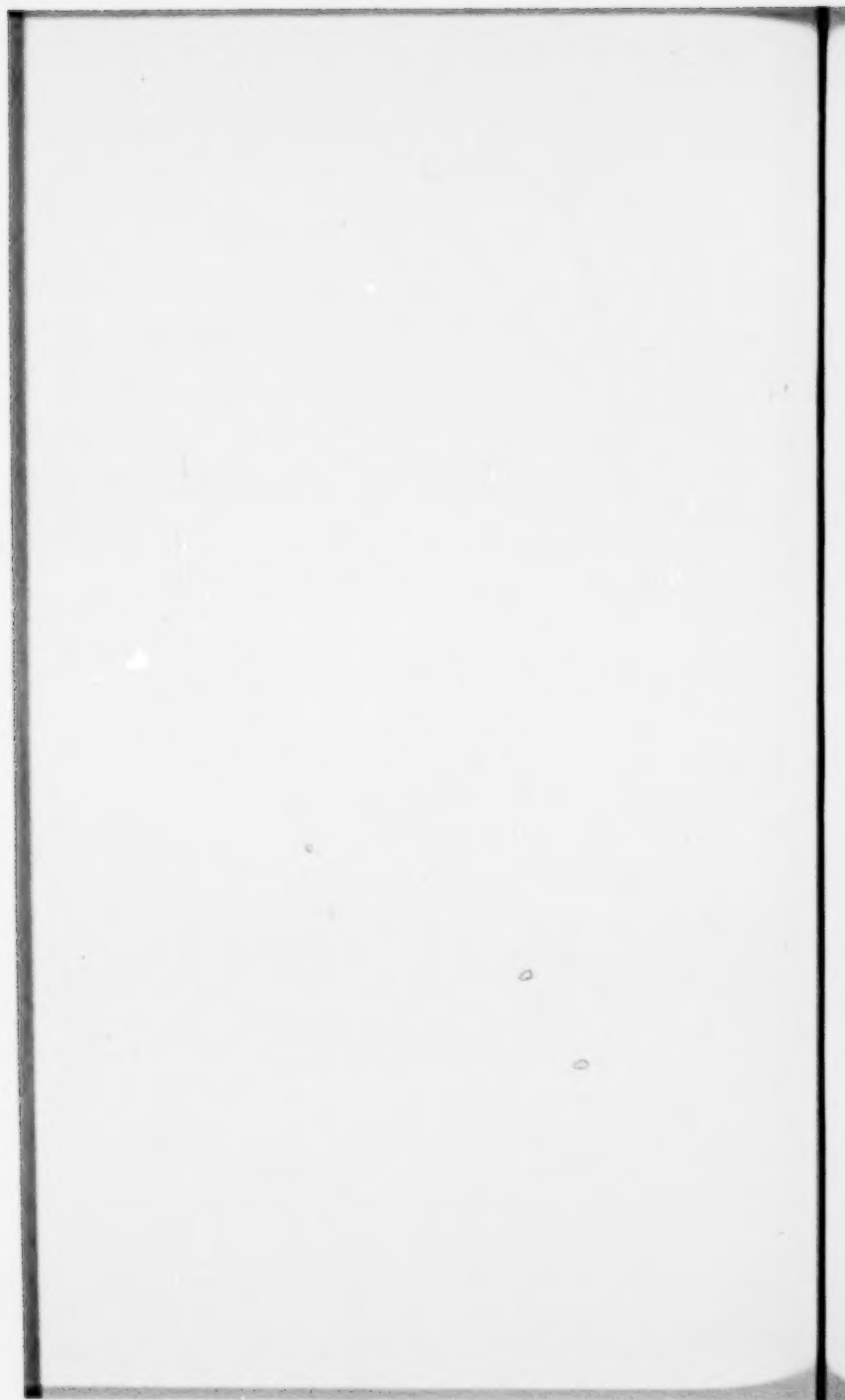
INTERNATIONAL PAPER COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT AND BRIEF IN SUPPORT THEREOF**

JOSEPH NEMEROV,
Counsel for Petitioner.

EDWARD A. ROTHENBERG,
AARON SCHWARTZ,
Of Counsel.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Ethel Kresberg, respectfully prays that a Writ of Certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on June 28, 1945, affirming an order and judgment of the United States District Court for the Southern District of New York (R. 118-123), which dismissed the complaint of the petitioner against the respondent on jurisdictional grounds.

Statement of Matter Involved.

This action was instituted in the District Court for the Southern District of New York by petitioner, the owner and holder of \$5,000. in principal amount of debentures payable

to bearer and made by International Hydro Electric System (hereinafter called Hydro). Said debentures were part of an issue sold to the public in 1929, and were acquired by petitioner by purchase in the open market prior to their maturity. Approximately \$25,000,000. in principal amount of said debentures are presently outstanding and matured as to principal on April 1, 1944. Hydro was unable to pay the principal amount of said debentures at their maturity date, and they remained unpaid at the time of suit. Petitioner brings this action on her own behalf and in behalf of all others similarly situated, and seeks to have the respondent International Paper Company (hereinafter called "Paper") adjudged liable for the payment of the principal amount represented by said debentures, under the "instrumentality rule", upon the ground that Hydro was created by Paper as its vehicle and tool, expressly for the purpose of raising moneys by ulterior means, for its own use and purposes, through the sale of the aforesaid debentures (R. 7-53).

The sole question involved herein is a jurisdictional one. Therefore, it is not necessary to give a detailed recitation of the facts upon which the substantive liability of the respondent is based.

There is a diversity of citizenship between petitioner and respondent. Petitioner is a citizen of Florida and respondent is a corporation organized and existing under the laws of the State of New York. It maintains an office in that state within the Southern District (R. 9-10). The debentures involved in this suit are bearer instruments which she owns and holds as a subsequent holder (R. 61). No diversity of citizenship was shown between the original holder or petitioner's predecessor and the defendant.

Hydro was organized in Massachusetts and is commonly known as a Massachusetts trust. While not chartered as a corporation, it has a statutory status as an "association"

(R. 9), which is recognized by the Courts and the Legislature in that state as a quasi-corporation and is generally considered as a corporation. It was created pursuant to a common law declaration of trust under which it possesses practically all of the rights, powers, attributes and characteristics of a chartered corporation (R. 90-95).

In addition to having an artificial name, by-laws and a seal, it has an elected board of directors (except that the first board was designated by the trustees). This board has and exercises broad powers much like those of the board of directors of a chartered corporation (R. 90-91).

Hydro has shareholders who own the beneficial interest in the trust estate, represented by shares of different classes, which like those of a chartered corporation, have different rights, privileges, and preferences in respect to dividends and to payment in distribution upon dissolution and liquidation (R. 92).

Dividends are declared on the shares by the board of directors, as dividends are declared on corporate stock. Some of the shares carry voting rights and certain actions can be taken only after a prescribed number of shares have so voted. An office must be maintained for the transfer of Hydro's shares and annual meetings of shareholders are held (R. 92-94).

Neither the directors, the trustees nor the shareholders have any personal liability (R. 91).

Hydro does not cease to exist upon the death of any trustee, director, or shareholder (R. 94).

Pursuant to Chapter 182 of the Laws of Massachusetts, Hydro has filed a copy of its declaration of trust with the Massachusetts Commissioner of Corporations (R. 97-98), and it may sue (R. 95) and be sued in its own name and its property is subject to attachment and execution (R. 96-97).

Hydro has been financed by the sale of its shares and debentures to the purchasing public through underwriters

(R. 42-43), and its board of directors issues an annual report similar to that customarily issued by a corporate board of directors (R. 98).

Moreover, Hydro's debentures, including the debentures involved herein, are publicly traded on the New York Stock Exchange, and were so acquired by petitioner (R. 61-62).

Respondent does not contend that said debentures were assigned to petitioner for the purpose of conferring jurisdiction on the District Court.

The respondent moved for an order and judgment dismissing the complaint solely on the ground that the jurisdictional requirements of Section 24 (1) of the Judicial Code (28 U. S. C. 41 (1)) had not been met by petitioner and that therefore the District Court lacked jurisdiction over the subject matter of the action (R. 55-57). The District Court granted the motion and the Circuit Court of Appeals, Second Circuit, affirmed.

Statement of the Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)).

The date of the decree sought to be reviewed herein is June 28, 1945. This petition is presented on or before September 28, 1945.

The statute of the United States involved is 28 U. S. C. A. Sec. 41 (1); Jud. Code, Sec. 24 (1), the pertinent provisions of which are as follows:

"No district Court shall have cognizance of any suit
* * * to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover

upon said note or other chose in action if no assignment had been made."

Question Presented.

Whether a quasi-corporation which possesses the essential characteristics of a chartered corporation to such a degree that it is generally considered a corporation, comes within the purview of the term "any corporation" as used in Section 24 (1) of the Judicial Code, 28 U. S. C. A. Sec. 41 (1), wherein said term is not expressly defined.

Rulings of the Courts Below.

The District Court determined the above question in the negative. It granted the motion to dismiss by an order dated August 8, 1944 and a judgment was entered on August 10, 1944 (R. 118-123). Its opinion is not reported but appears at pages 35-39 of the record.

The Circuit Court of Appeals also determined the above question in the negative and affirmed by decree entered June 28, 1945. Its opinion is reported in 149 F. 2d 911 and is contained in the appendix herein.

Reasons for Allowance of Writ.

A review of the writ of certiorari should be granted herein, as a matter of sound judicial discretion, for one or more of the following special and important reasons:

1. The Circuit Court of Appeals held that although Hydro is a quasi-corporation and possesses the essential characteristics of a chartered corporation to such a degree that it is generally considered a corporation, it does not come within the purview of the term "any corporation", as used in Section 24 (1) of the Judicial Code, 28 U. S. C. A. Sec. 4 (1). Said decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Scott*

County, Ark. v. Advance-Rumley Thresher Co., 288 Fed. 739, that a quasi-corporation (in that case a county) is encompassed by said term. It is also in conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, in *Bloomfield Village Drain District v. Keefe*, 119 F. (2d) 157, wherein it was held that a body (in that case a drain district) which exhibits the essential characteristics of a corporation, although not specifically designated as such by statute, falls within the term "any corporation", as provided in Section 24 (1) of the Judicial Code.

2. The aforesaid decision of the Circuit Court of Appeals pertains to an important question as to the construction of the aforesaid federal statute involving the jurisdiction of the federal district courts, which question of federal law has not been, but should be, settled by this Court.

The question involved herein is substantial. The courts have recognized that organizations of the type of Hydro have come to occupy a large field in industry and in finance. Consequently, this Court, as a court of last resort, should definitely and finally determine the increasingly important question presented herein.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

September 24, 1945.

ETHEL KRESBERG,
Petitioner.

By
JOSEPH NEMEROV,
Counsel for Petitioner.

